In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 180

TRANSBAY CONSTRUCTION COMPANY,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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This case involves only a question of local law. There is no showing in the petition that the decision of the Circuit Court of Appeals is probably, or at all, in conflict with applicable local decisions, as required by Rule 38(5) of the Supreme Court. Moreover, the petition contains so many inaccuracies and irrelevancies, and omits so many of the controlling factors, as to present an untrue picture of the question presented.

The contractor agreed to complete the contract within 730 days (R. 302), but it was provided that additional time might be granted the contractor on account of unavoidable delays (R. 302, 303), which were defined as being delays resulting from causes beyond the control of the contractor and against which it could not have provided, including orders of the public authority changing the work or the manner of its performance (R. 303, 304). It was further provided that apart from extensions of time for unavoidable delays, no payment or allowance of any kind should be made to the contractor on account of delay from any cause in the progress of the work, whether such delay was avoidable or unavoidable (R. 305, 306). All requests for extensions of time within which to complete the contract were sought and made by Transbay; none by the City.

One of the items of work to be done was excavation to sufficient depth to secure a foundation on sound ledge rock, as determined by the engineer (R. 309). The specifications contained an estimate of the quantity of excavation as being 30,000 cubic yards, but it was stipulated that this and other estimates were for the purpose of comparing bids only and that the city did not agree that the actual amount "will correspond even approximately to this estimate", but reserved the right to increase or decrease the amount or eliminate items (R. 296-297). Payment for the excavation was to be made on a unit bid price basis of $2.75 per cubic yard. Transbay was paid at this rate for all the 84,000 cubic yards of excavation.

The work done under the contract was precisely the work called for by it; there was no change whatever in the character of the work. The dam as completed was exactly the dam contemplated in the contract and the specifications. Its nature as an arched gravity dam was not changed in any degree during the progress of the work (R. 422, 531, 729, 780, 1556). Counsel for petitioner stipulated that the dam as finally completed was not at all different from the dam shown on the plans and specifications (R. 1670, 1671). The sole claim upon which the present suit was based was that by reason of the manner in which the excavation was ordered, completion was delayed and the cost of the work to the contractor thereby increased. The testimony of the contractor showed that the mere fact of the increase *in the amount* of necessary excavation over the estimate did not result in any undue burden (R. 588, 589, 590, 413, 741, 742). All the references in the petition, therefore, to cases which deal with a change in the *character* of the work to be done, and to the fact that the necessary excavation was greater than the estimate for comparison of bids, are wholly beside the point. The sole ground of complaint was delay and the sole question considered by the Circuit Court of Appeals was the nature of the remedies "available to the contractor where delay was caused by the city's orders for excavation".

What actually happened, as appears from the opinion of the Circuit Court, was that after the necessity for an extension of time became apparent, the contractor applied to the city for an extension of time

under the contract on the ground that the delay was unavoidable. Later other extensions were granted "upon Transbay's statements that further unavoidable delays had occurred". Upon completion the contractor was paid the full unit contract prices.

After completion the contractor filed a claim for $450,464.46 for damages for delay. This claim was reasserted in the first count of the complaint in the present action, but by bill of particulars was reduced to $386,226.14. No recovery was allowed by the trial court on this claim because of the fact that the claim was not presented within the time required by the city charter. What the trial court did, however, was to allow the contractor, on the ground of delay, to treat the whole contract as abrogated or rescinded and to award it, without regard to the contract prices, and on the basis of an abrogation of the contract, the value of all work done and materials furnished, plus a profit (which profit was fixed at $386,227.14), less the amount of payments received. This resulted in a judgment in the sum of $791,253.34, or approximately twice the amount of the total damage claimed for the delay. This award was made by the District Court notwithstanding the fact that the contractor had never at any time elected to rescind the contract, but on the contrary, after full knowledge of the facts, had sought extensions under the contract and elected to proceed under its terms.

The Circuit Court of Appeals found it unnecessary to decide whether or not the contract provisions pre-

cluded the contractor from recovering damages on account of the delay. We believe that they did. Indeed, counsel for the contractor, in their petition for rehearing before the Circuit Court of Appeals, conceded that no damages could be recovered (wholly apart from the limitations of the charter) under the recent decision of this court in *United States v. Rice,* 317 U. S. 61, involving a contract not nearly as stringent against the contractor as the one here involved. But the Circuit Court of Appeals held that, wholly irrespective of our contention in this regard, and even assuming for the purpose of decision that the orders of the city were so unreasonable as to amount to a breach of contract, nevertheless under the well-settled California rule the contractor could not recover on the basis of a rescission where he had not elected promptly to rescind upon discovery of the facts. The court called attention to the controlling California statute and decisions as follows:

> "The suit is governed by local law. The California Civil Code, §1688, provides that a contract is extinguished by its rescission. Section 1691 of the Civil Code states: 'Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right * * *' This statute has been strictly applied by the California courts. Wills v. Porter, 132 Cal. 516, 521, 64 P.

896; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 P. 163; see California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593."

The court further said that "Transbay does not question the force of local rules; indeed, it does not even claim to have rescinded", and upon the basis of the local law thus clearly established, it reversed the judgment of the District Court.

The present petition does not mention either the California statute or the California decisions cited by the court below. It cites cases from other jurisdictions involving no question of delay at all, but situations where the public authority required a *character of work different from or additional to that contemplated by the contract.* There is no need to discuss these decisions. Some of them hold that where new work is ordered and the contract departed from, the contractor may recover in *quantum meruit* for the extra work. But here no extra work was ordered. The contract was in no respect departed from. The delay was treated by both parties as coming within the contract terms. In none of the cases relied upon by petitioner was the contractor allowed, after completion of the contract, to disregard the contract measure of compensation for the work done thereunder and substitute for what had proved to be an unprofitable bargain, a more profitable recovery for work described in the contract.

The petition is so utterly devoid of any discussion of the local law, and the authorities relied upon are so

utterly inapplicable, that we do not pursue the matter further except to point out certain inaccuracies in the petition.

For instance, it is untrue, as stated in the petition, that "the specifications indicated that the total amount of rock to be excavated was 30,000 cubic yards, which would be equally divided between the north and south canyon walls", for there was no indication in the specifications as to how the excavation would be divided between the two sides of the canyon. When the petitioner speaks of the amount of the excavation "originally contemplated" as having been exceeded, it refers only to the estimate for comparison of bids, which might under the contract be increased, diminished or eliminated without any incurring of liability on the part of the city.

The discussion of a possible change in the nature of the dam is wholly irrelevant; the dam as built was precisely the dam contemplated by the specifications (R. 1670) and the discussion had nothing to do with any delay in completion (R. 745, 747). This of necessity was the case as the structure erected was the addition to an existing dam. Likewise immaterial is the reference to grouting, for, as pointed out by the Circuit Court of Appeals, any expense caused by delay in grouting was inconsequential, even under plaintiff's own claim of damage. The contractor's witnesses agreed that the only substantial detriment which they suffered related to the excavation (R. 1285). Indeed, in plaintiff's claim for damages only one-sixtieth of the damage was attributed to the element of grouting.

If Transbay is allowed to prevail in this suit, the effect of it would be to forever destroy competitive bidding. A municipality would, if Transbay prevails, never be in a position to know whether it had a firm contract for public work or not. A contractor could bid, then disregard his contract and thereafter sue in *quantum meruit*. This would be disastrous to the conduct of municipal affairs.

It is respectfully submitted that the petition is wholly without merit and should be denied.

Dated, San Francisco, California,
August 11, 1943.

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